Leukemia and Lymphoma Society *and* Brittany Lynn Doering. Case 16–CA–152958

February 17, 2016

ORDER DENYING MOTION

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On October 29, 2015, the General Counsel issued a complaint alleging that the Respondent, Leukemia and Lymphoma Society, violated Section 8(a)(1) of the Act by terminating its employee, Charging Party Brittany Lynn Doering, for engaging in protected concerted activity, and by maintaining several overbroad handbook rules. The Respondent filed an answer denying the complaint allegations and, on December 4, 2015, filed a Motion for Summary Judgment with supporting argument. The General Counsel filed an opposition, and the Respondent filed a response to the opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Respondent's motion is denied. The Respondent has failed to establish that there are no genuine issues of material fact warranting a hearing and that it is entitled to judgment as a matter of law.[1]

Dated, Washington, D.C. February 17, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

Contrary to my colleagues, I would issue a notice to show cause why the Respondent's Motion for Summary Judgment should not be granted. Among other issues, this case involves a dispute over whether an alleged discriminatee, Brittany Doering, is a supervisor under Section 2(11) of the Act. Section 102.24(b) of the Board's Rules and Regulations provides for the potential entry of summary judgment without a hearing, which may be warranted if there is "'no genuine issue as to any material fact'" and "'the moving party is entitled to judgment as a matter of law.'" *Security Walls, LLC*, 361 NLRB No. 29, slip op. at 1 (2014) (quoting *Conoco Chemicals Co*., 275 NLRB 39, 40 (1985)).

Here, the Respondent moves for summary judgment with respect to the 8(a)(1) discharge allegation described in the complaint. The Respondent submitted with its motion various sworn declarations, as well as an appendix including its employee handbook and numerous pages of emails. The Respondent argues that, based on these facts, as applied to the relevant law, the alleged discriminatee meets various indicia of supervisory status under Section 2(11), and is therefore a statutory supervisor excluded from coverage under the Act and its protections.

In his response, the General Counsel argues that the Board should deny the Respondent's motion because the "[m]otion simply highlights the factual and legal disputes that are framed by the pleadings and warrant a hearing before an administrative law judge . . . ." The General Counsel further argues that he "intends to establish at hearing that the Charging Party was, in fact, an employee within the meaning of the Act at the time of the alleged unfair labor practices. Specifically, the General Counsel intends to offer documentary and testimonial evidence in support of the complaint allegations, including the fact that the Charging Party should be afforded the protection of the Act as an employee within the meaning of the Act." Finally, the General Counsel argues that the signed "self-serving" declarations attached to the Respondent's motion should be "stricken" because they, along with "various assertions in Respondent's [m]otion[,] raise factual issues which are best left to a hearing before an Administrative Law Judge." According to the General Counsel, the testimony of Respondent's witnesses should not be considered unless and until they have testified before a judge.

[1] The dissent argues that the General Counsel's opposition to the Respondent's motion is insufficient to establish that there is a material issue of fact warranting a hearing. We disagree. Sec. 102.24(b) of the Board's Rules and Regulations provides:

> It is not required that either the opposition or the response be supported by affidavits or other documentary evidence showing that there is a genuine issue for hearing. The Board in its discretion may deny the motion where the motion itself fails to establish the absence of a genuine issue, or where the opposing party's pleadings, opposition and/or response indicate on their face that a genuine issue may exist.

Here, the pleadings, including the Respondent's denial of the complaint allegation that Doering was an employee and its affirmative defense asserting the same argument, indicate that a genuine issue exists as to this critical fact. In addition, the Respondent submitted a lengthy "record" providing its version of the facts, supporting its motion and controverting the relevant allegations of the complaint. In response, the Region reasserted its position, summarily but sufficiently to comply with the Board's Rules. Therefore, we find that this factual issue remains unresolved and that a hearing is required.

In my view, the General Counsel's response is deficient. As provided in Section 102.24(b), I believe the Board should issue a notice to show cause why summary judgment should not be granted. In *L'Hoist North America of Tennessee, Inc*., 362 NLRB No. 110, slip op. at 3 (2015), I indicated that—when a party files a motion for summary judgment that fairly establishes the absence of any dispute as to material facts and that the party is entitled to judgment as a matter of law—the General Counsel must respond with something more meaningful than conclusory statements that there needs to be a hearing. In *L'Hoist*, I indicated that "this necessarily requires some 'preview of the evidence to be presented at trial' that conflicts with the material facts set forth in a sworn affidavit and relied upon by the party seeking summary judgment." It is true that Section 102.24(b) does not require that an opposition be "supported by affidavits or other documentary evidence showing that there is a genuine issue for hearing." However, "in response to a motion for summary judgment . . . the General Counsel at least must explain in reasonably concrete terms why a hearing is required. Under the standard that governs summary judgment determinations, this will normally require the General Counsel to identify material facts that are genuinely in dispute." Id.

Applying the framework I described in *L'Hoist North America of Tennessee*, supra, I would find that the General Counsel's opposition is insufficient because, on its face, it provides nothing more than conclusory assertions and refuses to make any reasonable effort to identify what genuine disputes as to material facts, if any, warrant a hearing. At bottom, the General Counsel has failed to explain, in reasonably concrete terms, *why*—based on material facts that are genuinely in dispute—a hearing is required. Thus, I would issue a notice to show cause why the Respondent's motion should not be granted, and I respectfully dissent.

Dated, Washington, D.C. February 17, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD